

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DENNIS JAMES THOMPSON,

Defendant-Appellant.

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UNPUBLISHED

May 1, 2001

No. 219215

Iosco Circuit Court

LC No. 98-003772-FC

Before: O’Connell, P.J., and Zahra and B.B. MacKenzie\*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of malicious destruction of personal property over \$100, MCL 750.377a; MSA 28.609(1); assault while armed with a dangerous weapon (felonious assault), MCL 750.82; MSA 28.277; fleeing and eluding a police officer, MCL 750.479a(2); MSA 27.747(1)(2); and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was acquitted of an additional count of felonious assault, discharging a firearm while intoxicated, MCL 750.237; MSA 28.434, and trespass, MCL 750.552; MSA 28.820(1). The trial court sentenced defendant to sixteen to forty-eight months’ imprisonment on the malicious destruction of property conviction, twenty-four to forty-eight months’ imprisonment on the felonious assault conviction, sixteen to twenty-four months’ imprisonment on the fleeing and eluding conviction, and twenty-four months’ imprisonment on the felony-firearm conviction to be served consecutively to the other three sentences. He was also ordered to pay restitution in the amount of \$1,991.20. Defendant appeals as of right. We affirm defendant’s convictions, vacate the portion of the judgment of sentence imposing a consecutive sentence, and remand for entry of a judgment of sentence that provides defendant’s felony-firearm sentence is to be served concurrent to his other sentences.

Defendant first contends that the trial court erred in ordering his sentences for malicious destruction of property, felonious assault, and fleeing and eluding to run consecutively to his sentence for felony-firearm. We agree. The question whether consecutive sentencing is statutorily mandated is a question of law that this Court reviews de novo. *People v Alexander*, 234 Mich App 665, 675; 599 NW2d 749 (1999). Sentencing in Michigan is concurrent unless consecutive sentencing is statutorily authorized. *People v Underwood*, 167 Mich App 646, 648;

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\* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

423 NW2d 304 (1988). The felony-firearm statute, MCL 750.227b; MSA 28.424(2), authorizes consecutive sentencing, providing in pertinent part:

(1) A person who carries or has in his or her possession a firearm when he or she commits or attempts to commit a felony, except [unlawful sale of a firearm, carrying a concealed weapon, unlawful possession of a pistol, or altering identifying marks on a firearm] is guilty of a felony, and shall be imprisoned for 2 years. Upon a second conviction under this section, the person shall be imprisoned for 5 years. Upon a third or subsequent conviction under this subsection, the person shall be imprisoned for 10 years.

(2) A term of imprisonment prescribed by this section is in addition to the sentence imposed for the conviction of the felony or the attempt to commit the felony, and shall be served consecutively with and preceding any term of imprisonment imposed for the conviction of the felony or attempt to commit the felony.

Defendant's conviction for felonious assault arose from his assault of a police officer and his acquittal on the second felonious assault count was related to his alleged assault of his then father-in-law. Defendant was charged with felony-firearm only in connection with the alleged assault against his then father-in-law. The jury was instructed that the felony-firearm charge related to the alleged assault of the father-in-law. It is well-settled that a jury may properly find a defendant guilty of felony-firearm despite the fact that it acquitted the defendant of the underlying felony. *People v Goss (After Remand)*, 446 Mich 587, 597-599; 521 NW2d 312 (1994). However, because defendant was acquitted of the offense underlying his felony-firearm conviction, the trial court improperly ordered defendant's felony-firearm sentence to run consecutively to his other sentences.

Our Supreme Court recently held that under the plain language of MCL 750.227b; MSA 28.424(2), a sentence for felony-firearm is to be consecutive only to the sentence for a specific underlying felony. *People v Clark*, 463 Mich 459, 463; 619 NW2d 538 (2000). The Court stated:

[MCL 750.227b(2); MSA 28.424(2)(2)] clearly states that the felony-firearm sentence "shall be served consecutively with and preceding any term of imprisonment imposed for the conviction of the *felony* or attempt to commit the *felony*." It is evident that the emphasized language refers back to the predicate offense discussed in [MCL 750.227b(1); MSA 28.424(2)(1)], i.e., the offense during which the defendant possessed a firearm. No language in the statute permits consecutive sentencing with convictions other than the predicate offense. [*Id.* at 463-464.]

Accordingly, that portion of the judgment of sentence making defendant's sentence for felony-firearm consecutive to his remaining sentences is vacated, and we remand for entry of a judgment

of sentence ordering the felony-firearm conviction to be served concurrently with his other sentences.<sup>1</sup>

Defendant next maintains that the trial court abused its discretion in ordering restitution in the amount of \$1,991.20. This Court reviews the amount of restitution ordered for an abuse of discretion. *People v Tyler*, 188 Mich App 83, 87-89; 468 NW2d 537 (1991). An abuse of discretion will be found by this Court when an unprejudiced person, considering the facts on which the trial court's decision was based, would conclude that there was no justification or excuse for the decision made. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

The Crime Victim's Rights Act, MCL 780.751 *et seq.*; MSA 28.1287(751) *et seq.*, authorizes trial courts to order restitution, directing that

when sentencing a defendant convicted of a crime, the court shall order, in addition to or in lieu of any other penalty authorized by law or in addition to any other penalty required by law, that the defendant make full restitution to any victim of the defendant's course of conduct that gives rise to the conviction or to the victim's estate. [MCL 780.766(2); MSA 28.1287(766)(2).]

In determining the amount of restitution to order, the trial court must "consider the amount of loss sustained by any victim as a result of the offense." MCL 780.767(1); MSA 28.1287(767)(1). The trial court's determination of the victim's loss must be reasonable and based on the evidence presented. *People v Guajardo*, 213 Mich App 198, 200; 539 NW2d 570 (1995).

The order to pay \$1,991.20 in restitution was based on the damage to defendant's then wife's car in connection with his conviction of malicious destruction of property. The record demonstrates that the trial court's order of restitution in this amount was reasonable and based on the evidence presented. The presentence investigation report recommended restitution in the amount of \$1,991.20, and indicated that this was the cost of repairing the car. There was also expert testimony presented at trial that this amount represented the cost of repairing the gunshot damage to the car. Under these circumstances, we conclude that the trial court acted within its discretion in ordering defendant to pay restitution in the amount of \$1,991.20.

Affirmed in part and vacated and remanded in part. We do not retain jurisdiction.

/s/ Peter D. O'Connell  
/s/ Brian K. Zahra  
/s/ Barbara B. MacKenzie

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<sup>1</sup> We note that this disposition is necessary despite the fact it is apparent defendant also possessed a firearm while committing the other crimes of which he was convicted. *Clark, supra* at 464.